BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARY BANKS	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,811
BOEING COMPANY	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Claimant appeals the August 9, 2002 Award of Administrative Law Judge Nelsonna Potts Barnes. Claimant contends she is entitled to a work disability after being terminated from respondent's employment. Respondent, however, contends the termination was justified based upon claimant's significant attendance problems. The Appeals Board (Board) heard oral argument on May 6, 2003. Gary Peterson was appointed as Board Member Pro Tem for the purposes of this award.

APPEARANCES

Claimant appeared by her attorney, Randy S. Stalcup of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kirby A. Vernon of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, the Board finds that the Award of the Administrative Law Judge should be modified to grant claimant a work disability.

Claimant was employed as a sheet metal worker for respondent which required her to drill, countersink, rivet, buck rivets and use alligator squeezes. Claimant suffered accidental injury through a series of injuries beginning August 1998 through May 4, 1999. Claimant was referred to board certified orthopedic surgeon Robert L. Eyster, M.D., for treatment. Dr. Eyster treated claimant conservatively with physical therapy and returned her to work with respondent in an accommodated position. Claimant worked the accommodated position involving safety work, counting parts, placing foam and tape around ladders, receiving tools and sealants and placing items in their appropriate stocked positions.

During claimant's employment, she was counseled on numerous occasions by respondent regarding her attendance problems. While the record does discuss certain attendance difficulties claimant suffered, there were several incidents which were not made clear. Additionally, claimant testified that on several occasions, when calling in, she was unable to work due to the physical limitations created by her workers' compensation injuries. Claimant was terminated on May 14, 1999.

Two respondent employees–Lynn Hack (claimant's immediate supervisor) and Joseph Patrick (the assembly people's support manager)–testified in this matter. Mr. Hack acknowledged during his deposition he was unable to tell by the Deposition Exhibit 1[1] what specific infractions claimant was terminated for. Mr. Patrick's Deposition Exhibit 1[2] did not contain specific infractions relative to activities subsequent to March 15, 1999. The attendance run which would have contained that information was not available at that time. Claimant was involved in a corrective counseling session on February 12, 1999, and another on March 15, 1999, regarding her attendance problems. Between March 15, 1999, and claimant's termination date on May 14, 1999, claimant had four additional attendance infractions. However, the record is only clear as to two of those dates, both of which involved personal illness.

On May 7, 1999, claimant was four minutes late clocking in to her position. The determination was made on that date that claimant was to be terminated for her ongoing attendance difficulties. Again, claimant testified that she did not appear for work on

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[1] Hack Depo., R. Ex. 1.

[2] Patrick Depo., R. Ex. 1.

numerous occasions because of physical problems suffered as a result of her work-related injuries.

After leaving respondent, claimant worked for temporary services, including Manpower and another place which she was unable to recall the name of, she worked for RGIS (an inventory company), she worked for Dean & Deluca checking boxes of customer orders, and, at the time of regular hearing, she was working for SRS involving day care for her grandchildren. The times and dates of the temporary service, RGIS (the inventory company) and Dean & Deluca are not clear in the record. However, claimant testified she was earning $7 an hour at Manpower and the temporary service and was being paid $7.50 an hour to perform the inventory jobs. As of January 1, 2001, claimant began caring for her three grandchildren. This was a full-time position for which she was being paid $1,100 per month. In August 2001, when one of her grandchildren returned to school, claimant's status was dropped to part time and her pay dropped to $866 a month. After January 1, 2001, claimant made no attempt to find additional employment.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[3] Claimant was examined and/or treated by two different physicians who testified in this matter. Board certified orthopedic surgeon Robert L. Eyster, M.D., saw claimant on March 16, 1999, at respondent's request and continued treating claimant through June 11, 1999. He ultimately assessed claimant a 2 percent impairment to the body as a whole as a result of the ongoing pain complaints. His opinion was provided based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant was also referred to Daniel D. Zimmerman, M.D., at her attorney's request for an examination on February 23, 2001. Dr. Zimmerman assessed claimant a 10 percent impairment to the body as a whole also based upon the AMA *Guides* (4th ed.).

Both Dr. Zimmerman and Dr. Eyster were provided task lists which had been prepared by vocational expert Jerry D. Hardin. Dr. Zimmerman found claimant capable of performing 62 of 63 prior tasks, for a 2 percent loss. Dr. Eyster found claimant capable of performing 28 of 63 tasks, for a 56 percent loss. In considering the opinions of both Dr. Eyster and Dr. Zimmerman, the Board finds claimant has suffered a 29 percent loss of tasks.

In the Award, the Administrative Law Judge, finding neither Dr. Zimmerman nor Dr. Eyster to have a more persuasive opinion, split the functional impairment ratings, assessing claimant a 6 percent impairment to the body as a whole. The Board agrees with that assessment and affirms the 6 percent impairment.

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[3] *See* K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

The Board must next consider, under K.S.A. 1998 Supp. 44-510e, if claimant is entitled to a permanent partial general disability in excess of her functional impairment. K.S.A. 1998 Supp. 44-510e(a) defines "permanent partial general disability" as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

But that statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Kansas Court of Appeals held a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage-loss prong of K.S.A. 1998 Supp. 44-510e, that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related accident.

Here, claimant was returned to work at an accommodated position and continued performing that job for a substantial period of time. Therefore, the policies set forth in *Foulk* do not apply. However, respondent cites *Perez*[6] as controlling this matter. In *Perez*, the claimant had worked five hours after the day of the accident at full shift for the next three days and thirty-three out of the following fifty-seven days. The claimant was terminated for poor attendance. The Kansas Court of Appeals held that the claimant had not sustained his burden of proof that he lost the ability to perform work in the open labor market and to earn comparable wages (the predecessor to the current version of K.S.A. 44-510e), thereby eliminating claimant's right to a work disability.

A key issue in this matter focuses on claimant's attendance problems and whether the termination by respondent was appropriate. The record is somewhat clouded regarding the dates utilized in claimant's termination. It is obvious claimant had some problems with her attendance. However, as claimant testified at regular hearing, some of the incidents which were utilized against her involved situations where claimant was gone from work due to ongoing pain. Additionally, claimant listed various dates where she

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

clocked in late or did not attend due to physical therapy, which at that time was under the control of the authorized treating physician, Dr. Eyster.

The Board cannot find that claimant acted in bad faith, as was the case in *Perez*. Here, it is unclear from the record exactly what dates were utilized leading to claimant's termination. At least some of the dates involved were dates where claimant was absent either part of the day or the entire day while attending physical therapy. It would not be appropriate for absences due to a work-related injury or for treatment for that injury to be utilized against claimant in not only denying her employment, but also in denying her a work disability. The Board, therefore, finds claimant is entitled to a work disability under K.S.A. 1998 Supp. 44-510e.

The second prong of K.S.A. 1998 Supp. 44-510e's work disability equation involves claimant's wages or her ability to earn wages after claimant left respondent. Claimant's work history was poorly provided in the record. Claimant discusses several jobs, including temporary jobs with more than one company and inventory for certain companies, she worked for Dean & Deluca, and ultimately was employed by SRS, caring for her grandchildren. While caring for all three children, claimant was considered a full-time worker, working 40 hours a week and earning $1,100 a month. This equates to a $6.35-per-hour wage. After one of claimant's grandchildren returned to school, claimant's wages were dropped to $866 per month. This equates to an average weekly wage below the federal minimum wage, which the Board does not find is a good faith effort on claimant's part. Claimant ceased looking for employment after she obtained the SRS job.

In considering claimant's lack of good faith, the Board is obligated under *Copeland* to impute a wage from the evidence in the record. Claimant, while working full time with three children, was earning $6.35 per hour with SRS. Claimant earned $7 an hour with both of the temporary services and $7.50 an hour while working the inventory job with RGIS. Additionally, Mr. Hardin was asked about claimant's ability to earn wages. He opined claimant was capable of earning anywhere between $7 and $8 per hour.[7] For the period from claimant's last day of work of May 14, 1999, through December 31, 2000, the Board finds that either claimant did not put forth a good faith effort to find employment or the information provided by claimant was so sketchy, the Board is incapable of concluding that claimant made a good faith effort. Therefore, the Board will impute a wage of $7.50 per hour for that period of time. Once claimant began working for SRS at $1,100 per month, this equates to a $6.35-per-hour wage. After one of claimant's three grandchildren returned to school and her wages dropped in August of 2001, the Board finds claimant did not act in good faith in failing to attempt to find full-time employment. The Board will, therefore, as of August 2001, impute to claimant the $7.50-per-hour wage utilized earlier. The Board, therefore, finds that after leaving respondent's employment, claimant was either capable of earning or did earn $7.50 per hour, which equates to $300 per week,

[7] Hardin Depo. at 22.

which is a 73 percent wage loss. In considering both claimant's 29 percent task loss and 73 percent wage loss, the Board finds claimant has suffered a 51 percent permanent partial general disability for the period after May 14, 1999. The Board, therefore, modifies the award of the Administrative Law Judge and grants claimant a 51 percent permanent partial general disability to the body as a whole based upon an average weekly wage of $1,124.30 and a date of accident through May 4, 1999.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated August 9, 2002, should be, and is hereby, modified, and an award is granted in favor of the claimant, Mary Banks, and against the respondent, Boeing Company, and its insurance carrier, Insurance Company State of Pennsylvania, for an injury occurring through May 4, 1999, for a 51 percent permanent partial general disability to the body as a whole. Claimant is entitled to 211.65 weeks permanent partial disability compensation at the rate of $366 per week totaling $77,463.90 for a 51 percent permanent partial general disability. As of July 16, 2003, the entire amount would be due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of July 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority. The Administrative Law Judge determined that claimant's attendance problems did not constitute a good faith effort pursuant to *Copeland.*[8] This Board Member would agree. Claimant received a corrective counseling session on February 12, 1999, because claimant was absent all or part of December 21, 1998, December 23, 1998, January 7, 1999, January 13, 1999, January 15, 1999, February 5, 1999, February 8, 1999, February 9, 1999, and February 10, 1999. On March 15, 1999, claimant received another counseling session concerning absenteeism for February 24, 1999, and March 8 through March 12, 1999. At that time, claimant was advised in writing that she must improve her level of attendance to an acceptable level and maintain that level of attendance, or face further corrective actions up to and including termination. Between March 15, 1999, and May 14, 1999, claimant had four additional attendance infractions.

The majority appropriately cited *Perez v. IBP*[9] as controlling this case. This Board Member acknowledges that an employer may not terminate an employee for absences caused by a work-related injury.[10]

However, an employer may enforce an absence policy, neutral on its face, notwithstanding the pendency of a workers' compensation claim.[11]

This Board Member would find that claimant's attendance difficulties during the late winter and spring of 1999 did not constitute a good faith effort as mandated by *Copeland*, and further that claimant violated the policy set forth in *Foulk*. The Board would, therefore, find that this claimant should be imputed the wage she was earning with respondent at the time of her termination, thus limiting her to her functional impairment. This Board Member would affirm the determination by the Administrative Law Judge that claimant's award is limited to her functional impairment only.

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[8] *Copeland*, *supra*.

[9] *Perez*, *supra*.

[10] *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645 (1988).

[11] *Huffman v. Ace Elec. Co., Inc.*, 883 F. Supp. 1469 (D. Kan. 1995).

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Director